Court, U.S.
AUG 19 2002

(19)

No. 01-963

In the

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,

Petitioner,

v.

FREEMAN AYERS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

BRIEF OF THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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August 19, 2002

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MOTION OF THE UNITED TRANSPORTATION UNION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT FREEMAN AYERS, et al.

NOW COMES Amicus Curiae, The United Transportation Union, in support of respondent, Freeman Ayers, et al., by its attorney, Clinton J. Miller, III, pursuant to United States Supreme Court Rule 37, and moves this Honorable Court for leave to file an Amicus Curiae brief in support of the respondent. In support thereof, The United Transportation Union states:

1. Petitioner, Norfolk and Western Railway Company, through its attorneys, has not provided its consent to the submission of an Amicus Curiae brief in support of the respondent's position. However, respondent has provided his consent.

2. Amicus Curiae, the United Transportation Union, is a labor union representing railroad transportation operating employees on every major railroad in the United States. The railroad operating employees represented by the United Transportation Union rely on the protection of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (West 2000), to compensate them for on-the-job injuries or death.

3. Respondent and others filed a cause of action against petitioner pursuant to the FELA due to injuries sustained as a result of exposure to asbestos. After a jury verdict in favor of respondents, the petitioner claimed error on several grounds, including contending that it is entitled to an apportionment of fault among tortfeasors in order to reduce its liability to respondents. The trial court rejected this contention and the petitioner then sought review.

4. Amicus Curiae United Transportation Union is especially concerned that the petitioner is attempting to subvert nearly one hundred years of statutory and case law under the FELA by attempting to limit its liability pursuant to common law principles of apportionment of fault. This Court has never ruled that a railroad employee must look to parties other than his or her employer to receive full, fair, and just

compensation. Should the Court hold that apportionment principles do apply under the FELA, all railroad workers in this country will be left with an uncertain and incomplete remedy for injury or death that results while engaged in interstate commerce for the various railroads.

WHEREFORE, Amicus Curiae, The United Transportation Union, respectfully prays that this Honorable Court grant it leave to file an Amicus Curiae brief support of respondent.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICUS CURIAE UNITED TRANSPORTATION UNION

Currently, over 100,000 men and women in this country are working or retired members of the United Transportation Union. On a daily basis, the active members of the United Transportation Union place their own safety at risk in order to expedite interstate commerce on every major railroad in the United States. The work done by these dedicated employees is absolutely essential to maintaining the free flow of interstate commerce. Members of the United Transportation Union are directed by railroad employers with respect to when, where, and how to perform their work. Railroad employers then profit from this direction and labor. A review of the website for the Association of American Railroads ("AAR"), a lobbying group on behalf of railroads and railroad management, reveals that net income for Class I railroads exceeded two and one-half billion dollars in 2001.

Although efforts are constantly being made to improve railroad safety, history has demonstrated that the day-to-day operation of freight and passenger trains is very demanding and often dangerous. For example, in 1995, there were 1,114 rail-related fatalities and 10,795 rail employee fatalities/injuries. Enhancing Rail Safety Now and Into the 21st Century: The Federal Railroad Administration's Safety Programs and Initiatives, A Report to Congress, October 1996. However, the Association of American Railroads notes on its website that the railroad accident rate has fallen by thirteen percent since 1990 and sixty-four percent since 1950 and the injury and illness rate has fallen fifty-five percent since 1990 and sixty-nine percent since 1980. The Federal Railroad Administration report on Enhancing Railroad Safety published in October 1996 (and located on the FRA's website) confirms these declines in accident and injury rates. In fact, the AAR now claims that railroads have become one of the nation's safest industries. Part of the credit for this safety record is no doubt due in part to the liability scheme established by Congress under the FELA which encourages railroads to act safely for the protection of their employees regardless of where those employees are or with whom they

are working. Although railroad safety has improved, the thousands of railroad workers injured or killed each year continue to deserve the protection afforded by Congress and should have to look no further than their employer for full, fair and just compensation.

Under the compensation system created by Congress nearly one century ago, railroad workers who are engaged in interstate commerce are not entitled to workers' compensation benefits. Their only remedy for job related injuries is under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq.; Johannessen v. Gulf Trading & Trans. Co., 633 F.2d 653 (2d Cir. 1980). This remedy, however, is not available without proof. A railroad employee seeking to recover his lost wages and other damages for a job related injury must prove the traditional elements of negligence and causation before he or she can recover. Adams v. CSX Transp., Inc., 899 F.2d 536, 539 (6th Cir. 1990). Although the FELA may not be a perfect remedy, it is the remedy that was created by Congress in the early nineteen hundreds as a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." Sinkler v. Missouri Pacific R. Co., 356 U.S. 326 (1958). In enacting the FELA, Congress intended to craft "a federal remedy that shifted part of the 'human overhead' of doing business from employees to employers." Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994). Allowing a railroad to limit its liability based upon apportionment of fault, as suggested by the Norfolk and Western in this case, would significantly diminish the safety incentives created by Congress and placed squarely upon the employer and employee.

The purpose of the FELA is to equitably allocate the inevitable cost of human injury associated with the railroad industry. Urie vs. Thompson, 337 U.S. 163, 181 (1946). The United States Supreme Court has consistently held that the Act is meant to provide a broad remedial framework for injured railroad workers and should therefore be construed liberally to effectuate its humanitarian and remedial purpose. Id.; Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987).

In enacting the FELA, Congress intended to provide a uniform compensation system that would apply to all railroad workers who are injured on the job, regardless of the location of the injury and independent of state common law or state workers compensation systems. The FELA is vital to the ability of railroad workers to safely and efficiently perform their duties. It was Congress' intent to provide broader protection for FELA employee plaintiffs than typical common law plaintiffs because the FELA is a work-related compensation statute. Allowing a railroad to seek protection behind principles of apportionment of fault would not only subvert Congressional intent, but destroy the uniform compensation scheme and the broad remedial framework under the FELA. The average railroad worker would be forced to look to parties other than his or her employer for compensation. The worker will then be faced with the prospect of partial recovery when faced with the myriad common law limitations on recovery against non-railroad defendants, including the various immunities afforded governmental entities whose conduct might contribute to cause harm to the worker.

If the N and W's position is adopted, tens of thousands of railroad employees who are engaged in interstate commerce by rail will be exposed to the risk of harm without the ability to receive compensation for their on-duty injuries. This negative impact on the rights of FELA plaintiffs is of vital interest to the United Transportation Union. The perspective of amicus curiae UTU will complement that of respondents and will provide assistance to this Court in construing the FELA and deciding the issues presented.

SUMMARY OF ARGUMENT

I.

UTU supports the recovery of damages for both physical and emotional injury by injured rail employees including the fear of cancer. UTU has not briefed this issue since it will be fully addressed by Respondents and other

Amici Curiae. Rather, UTU will focus on the significant unfair impact of Petitioner's "proportionate fault" argument.

II.

The concept of proportionate fault seriously undermines the clear Congressional intent to provide full compensation to injured rail workers pursuant to the FELA. The entire cost of railroad injuries under the FELA are to be equitably adjusted between the worker and the railroad.

Petitioner's concern over the award is solely a damages issue. That concern should not be addressed as a liability issue by means of proportionate fault. The FELA statutory language "in whole or in part" refers to the railroad's total responsibility for all damages sustained, as a result of any railroad negligence, during railroad employment. That total responsibility can be diminished only by an employee's comparative negligence.

Damages issues, similar to those presented by the jury verdicts in favor of Ayers and Butler, are handled routinely in the courts. The damages issue here is no different than a back injury claim wherein a defendant/railroad presents evidence of a preexisting condition or injury or evidence of a subsequent back injury or condition. There are no issues of negligence or fault with regard to the preexisting condition or unrelated post-injury condition.

In FELA cases, a jury typically decides these damages issues, receiving proper instructions which embody principles similar to the following aggravation instruction:

> If you find that there was such an aggravation, you should determine, if you can, what portion of plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Devitt, Blackmar & Wolff, Federal Jury Practice & Instructions, Vol. 3, 85.03 (4th ed. 1987). The Ayers and Butler damages issues should be resolved on those principles. More importantly, UTU is primarily concerned with the serious and disastrous impact of "proportionate fault" on the right to full and fair compensation for injured rail workers under the FELA.

ARGUMENT

PROPORTIONATE FAULT UNDERMINES THE STATED PURPOSE OF THE FELA TO ADJUST THE EXPENSE OF RAIL INJURIES BETWEEN THE WORKER AND THE RAILROAD

For nearly 100 years, this Court and many other federal and state courts have recognized the clear remedial purpose of FELA legislation. The unbroken line of FELA jurisprudence establishes that the human cost of railroad injuries must be borne by the railroad-employer and diminished, if at all, only by employee comparative negligence. The employee has the right to look to his employer only where the employer's negligence causes, in whole or in part, injury to that employee. The Norfolk and Western proportionate fault position undermines that fundamental purpose of the Act.

In Sinkler v. Missouri Pacific R. Co., 356 U.S. 325 (1958), this Court observed:

> . . . in interpreting the FELA, we need not depend upon common-law principals of liability. This statute, an avowed departure from the rules of the common law, cf. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 507–509, 77 S. Ct. 443–450, 1 L.Ed. 2d 493, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S. Ct. 444, 87 L.Ed. 61. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier. Kernan v. American Dredging Co., 355 U.S. 426, 431, 438, 78 S.Ct. 394, 401, 2 L.Ed. 382. The Senate Committee

> which reported the Act stated that it was designed to achieve the broad purpose of promoting 'the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden' S.Rep. No. 460, 60th Cong., 1st Sess. 3.

Sinkler, 356 U.S. at 337. Railroad workers today travel daily across state lines, perform switching on industry property, interchange thousands of railcars owned by many different corporations, operate and work on locomotives owned by different railroads, traverse track maintained by outside companies, use equipment manufactured, owned, maintained or leased by others, are transported in independent, hired taxi vehicles at away from home terminals, and are housed overnight at lodging designated by their employers but owned and operated by others. That is just a brief sampling of the vast interconnected railroad enterprise experienced by our UTU employees every day.

Proportionate fault will open a "Pandora's Box" of potential wrongdoers (both real and illusory) for most rail injuries. When an injured railroad employee looks to his employer for compensation, that recovery will be shrunk by his employer's contention that its fault is diminished by the ownership of the railcar by someone else, the maintenance of the track by another party, the land owned by an industry or the taxi operated by another. Employees would be subjected to a merry-go-round of claimed potential wrongdoers, different state laws and defenses, potential insurance limits, a wide array of contractual arrangements, and liability or damages limitations. This list can go on and on. The difficulties of proof would be overwhelming, futile, unquestionably expensive, and time-consuming. The necessity of suing every possible tortfeasor would needlessly increase the cost and expense of litigation and would create a litigation explosion in our state and federal courts.

The goal of national uniformity of recovery for injured railroad workers would evaporate. See Dice v. Akron, Canton and Youngstown R.R. Co., 345 U.S. 811 (1951). It would disappear into the patchwork of 50 schemes of proportionate fault in the 50 states.

The purpose of the FELA is to provide a remedy for those who are helpless to provide for their own safety. Employee injury costs, an "inescapable expense of railroading," must be borne by employers who profit from that enterprise. Proof of employer negligence and causation is required and responsibility is "equitably adjusted" between railroad and worker by means of comparative negligence. This is fair and consistent with long established statutory construction of the FELA.

It is the employer who can adjust his charges, raise his shipping rates, choose his independent contractor, contract with private industry, write indemnification agreements adequately, and otherwise protect itself from the costs of employee injury. Congress understood that an employee cannot do that. Congress passed the FELA so that the entire costs of injury, caused in whole or in part by employer negligence, is divided equitably between employer and employee. That is the spirit and intent of this legislation. It is also the consistent statutory interpretation of the FELA by this Court and many others. The fact Congress has never amended the statute to alter this equitable division of injuries between employer and employee reinforces the fact that this interpretation is consistent with the intent of Congress. Moenssens S.W. R.R. v. Morgan, 486 U.S. 330 (1988).

It is a bedrock principle of FELA law that a railroad employer has a non-delegable duty to provide a safe place in which to work. Shenker v. B&O R.R., 374 U.S. 1 (1963). This duty would be trivialized to the point of non-existence by proportionate fault. A good example of the importance of this principle to injured railroad employees is Payne v. B&O R.R., 309 F.2d 546 (6th Cir. 1962). In Payne, the defendant railroad attempted to avoid liability by arguing that its employee's injury occurred on the property of an industry (SUCO) and that pursuant to a contract between the railroad and the

industry, the industry had the duty to maintain the track. The Sixth Circuit correctly noted:

> . . . Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk not the employee.

Id. at 548 (emphasis added). Clearly, under proportionate fault, a railroad would be able to delegate its responsibility, and blame industries, equipment owners, or any outside party, known and unknown to the injured employee, in an effort to diminish or extinguish its fault. This is contrary to the clear intent of FELA to allocate the human cost or overhead of the railroad enterprise equitably between the employer and employee.

Another good example of the injustice which could be inflicted upon railroad employees is Cazad v. C&O Railway Co., 622 F.2d 72 (4th Cir. 1980). Cazad was a CSX employee injured while performing railroad service on the property of Union Oil in West Virginia. He stepped into an uncovered drain culvert located about four to six feet from the track and sustained serious and disabling injuries. The injured railroad employee's claim against Union Oil was dismissed since, pursuant to West Virginia law, a landowner has no duty to warn persons of dangerous conditions which are open and obvious nor take steps to obviate such hazards. However, C&O's liability under the FELA was an entirely different matter. The decision noted that C&O had a non-delegable duty to provide its employees with a safe place to work even when required to go on property owned by third-parties. For Cazad, FELA provided a complete remedy for his injuries regardless of any proportionate fault by Union Oil and regardless of varying state law doctrines. Clearly, the historical remedial purpose of the FELA to provide a full remedy to employees negligently injured in the course of their employment, caused in whole or in part by employer

negligence, would be frustrated if the employer were able to diminish its liability by the fault of the landowner.

This Court in Shenker, supra., also recognized the danger of allowing railroads to shift blame to others wherein it observed:

> If recovery were denied in this case, the railroads by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk.

Shenker, 374 U.S. at 11. Countless cases interpreting the FELA have uniformly found a statutory construction and purpose that permits an employee to recover for all his injuries caused, in whole or part, by employer negligence. Proportioned fault renders those decisions meaningless and ineffective. This position was plainly stated in Rice v. Cincinnati, New Orleans & Pacific Railway Co., 920 F. Supp. 732 (E.D.Ky. 1996). There, an injured railroad employee brought suit against his employer under the FELA for injuries sustained in a crossing collision with a motor vehicle. The court, quoting other decisions, noted:

> FELA makes no provision for the reduction of damages recoverable by an employee against the carrier on account of the fault of any third person. Liability is thus imposed upon the carrier for all damages sustained by its employee except any part attributable to the negligence of the employee, if the injury is wholly or partly caused by the railroad's negligence. . .

Id. at 735.

N and W's Brief identifies so-called "trends" of the common law that allegedly support proportionate fault. Suffice it to say, none of these purported trends involve FELA cases or work-related injury claims between employee and employer. FELA is a statute which is an avowed departure from the common law. There is nothing more fundamental to that departure than the legislative decision to place the sole burden of employee injuries upon the employer.

A railroad employer's liability is similar to joint and several liability. As recognized in

McDermott v. AmClyde, 511 U.S. 202, 221 (1994), joint and several liability applies:

> When the plaintiff's recovery from other defendant's is limited by factors beyond plaintiff's control, such as defendant's insolvency. When the limitation on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendant's, rather than an innocent plaintiff, responsible for the shortfall.

Under the FELA, Congress decreed by statute that the employer is fully responsible in damages whenever its negligence, either wholly or partly, causes injury to an employee. The railroad employer, not the employee, takes the risk of any "shortfall."

FELA embodies the same principles Congress intended for longshoremen injuries. In Edmonds v. Companies General Transatlantic, 443 U.S. 256 (1979) this Court reversed a proportionate liability ruling diminishing the recovery of an injured longshoreman. There, this Court observed the fundamental flaw of a proportionate fault approach in work-related injury cases; specifically, "there will be many circumstances where the longshoremen will not be able to recover in any way the full amount of the damages determined in his suit against the vessel." Id. at 269.

This Court should decline to alter the longstanding statutory construction of the FELA that the entire cost of employee injury be equitably divided between employer and employee. UTU members today, who daily encounter numerous situations involving other parties, must be able to look to their respective employer for full damages where employer negligence plays any part, no matter how small, in bringing about the injury.

The concerns raised by N & W, particularly relating to the claims of Ayers and Butler can be, and should be, fairly decided based on existing damage principles regularly applied in many other FELA cases.

It must be recognized that because of the nearly 30 year delay between employment exposure and the discovery of injury, the Ayers and Butler claims are relatively unique. "In whole or in part" as applied to Butler's claim simply means that, upon proof of any negligence by N & W, the employer is 100 percent responsible (less employee contributory negligence) for the employment related injury. It does not matter that, during those three years of employment, N & W can show that the work related exposure was partially the result of a joint tortfeasors' negligence or fault. FELA renders a negligent railroad fully responsible for the injury caused during those three years.

How to measure the damages for those three years is the real issue. It is not a liability or proportionate fault issue. A trial jury should be allowed to hear all the evidence bearing on the Respondent's lung condition, including his exposure to asbestos after he left rail employment. Just as in pre-existing condition cases (i.e. such as an arthritic back) the jury, even in the absence of a clear divisibility of injuries or exposure, must be allowed to decide the issue. As the pattern instructions suggest, if the jury can "determine . . . what portion of Plaintiff's condition resulted" from the negligent exposure at N & W, "make allowance in your verdict only for the" condition caused by the negligent exposure. However, "if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, . . . make allowance in your verdict for the entire condition."

Devitt, Blackmar & Wolff, Federal Jury Practice & Instructions, Vol. 3, 85.03 (4th ed. 1987). Juries, without the certainty of mathematical precision, percentage findings, or specific expert testimony, render similar judgements on the amount of damages everyday.

CONCLUSION

The proper manner in which to assess N & W's contentions is to decide this as a "measure of damages" issue. The concern of the railroad employer can be fairly addressed consistent with established case law. More importantly, this Court should reject the proportionate fault scheme which is unfair to railroad workers and contrary to the plain language and legislative intent of FELA and reaffirm that the railroad workers of this country need only look to their railroad employer for full, fair and just compensation.

Respectfully submitted,

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